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## Sandford v. Town of Woffeboro, 868 A.2d 1002 (N.H. 2005)

John Lintzenich

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join all necessary parties. The court reversed and remanded to the district court for further proceedings.

*Jeff Gillio*

### NEW HAMPSHIRE

**Sandford v. Town of Wolfeboro, 868 A.2d 1002 (N.H. 2005)** (holding the character and nature of the use that created the prescriptive easement defined the scope of that prescriptive easement, and a town had limited flexibility in exercising its prescriptive easement where the water levels the town maintained affected private property owners).

Joseph W. Sandford, Jr. ("Sandford") appealed a decision from the Carroll Superior Court of New Hampshire that determined the scope of the Town of Wolfeboro's ("town") easement included the right to flow Sandford's land as a secondary result from adjusting to the needs, desires, and circumstances of the town's water situation by controlling its dam. The superior court concluded it could not use the scope of an easement to determine prescriptive flow rights because the nature of the two rights was extremely different; instead, the court found only historically and customary use of the dam could determine the scope of an easement. On appeal, the Supreme Court of New Hampshire considered whether the superior court's assessment of the scope of the easement was proper.

Sandford owned land on the shore of Lake Wentworth in Wolfeboro. A dam controlled the lake's water level and maintained a water level of approximately 534.7 feet above sea level, which it had been since the 1920s. In 1958 Smith River Corporation deeded the dam to the town, and the deed required the town maintain certain minimum water levels in the lake, which varied by season. The deed did not specify a maximum water level for the lake. Through its predecessors in title, the town also had a prescriptive easement to flow water up to the top of the dam. As a result, for parts of each year, the town would flow Sandford's land to the same level: approximately 534.7 feet above sea level.

Sandford argued the trial court improperly defined the scope of the town's easement based on intent, rather than actual use. He contended pre-1958 water reports and other documentation established the town did not historically flow the dam, and thus his land, to the full height, but that in most years, the town maintained lower water levels. The New Hampshire Supreme Court stated the character and nature of the use that created the prescriptive easement was what defined the scope of that prescriptive easement. The court then noted it had previously addressed a similar case where the court held one acquires a right to an easement by uninterrupted use of the right at all times in accordance to the pleasure or convenience of the party claiming the right. Accordingly, the court reiterated the right to a water level "as

high as the owner of the easement desires, subject to the natural fluctuations of weather and seasons” was a long-standing rule of law in New Hampshire. Furthermore, the court clarified an owner had the right to increase water levels as high as possible, regardless of any seasonal variations in water levels during the prescriptive period.

Looking to Sandford’s case, the court then concluded a reasonable person could have found the town did have an easement to flow Sandford’s land to 534.7 feet above sea level. The court reasoned this was consistent with the historical and customary use of the dam, taking into account seasonal changes in weather. Therefore, the New Hampshire Supreme Court agreed with the trial court in determining the scope of the town’s easement and affirmed its ruling.

*John Lintzenich*

## NEW JERSEY

***In re Authorization for Freshwater Wetlands Gen. Permits, 860 A.2d 450 (N.J. Super. Ct. App. Div. 2004)*** (holding the New Jersey Department of Environmental Protection must gather additional facts and conduct further analysis to determine whether wetlands were isolated because evidence suggesting otherwise).

Preserve Old Northfield (“POND”) appealed the decision of the New Jersey Department of Environmental Protection (“DEP”) to issue Daniel Markowitz of Maramark Builders, L.L.C. (“Markowitz”) a Letter of Interpretation (“LOI”) and a Freshwater Wetlands General Permit (“GP6”). DEP issued the LOI and the GP6 after it concluded the wetlands on Markowitz’s land were “isolated wetlands” within the meaning of New Jersey state law. POND contended Markowitz’s land, which sat adjacent to POND land, contained numerous wetlands consisting in part of an inland tributary system and the GP6 violated the Freshwater Wetlands Protection Act (“FWPA”).

In February 2001 Markowitz applied to DEP for authorization to fill a portion of the wetlands in connection with his residential construction project. From the time of application time until the end of 2003, POND, its engineering expert, and other interested parties submitted numerous documents and reports to DEP in opposition of the application. Specifically, POND submitted information that indicated a loss of flood storage from stormwater would occur with filled wetlands, resulting in ponding and flooding on POND land.

On June 8 and August 20, 2001, DEP inspected the property at issue. After these inspections, DEP issued the LOI on August 30, 2001. The LOI reflected DEP’s finding that the wetlands were of “intermediate” and “ordinary” resource value as defined in the FWPA and New Jersey state law. DEP denied POND’s request for an adjudicatory hearing. POND continued to submit additional reports and requested DEP visit the property during the rainy months in order to observe the